

No. 03-19-00198-CV

In the Court of Appeals Third Judicial District
In Austin, Texas

Madeleine Connor,
Appellant

VS.

Douglas Hooks,
Appellee

RECEIVED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS
5/4/2020 3:38:02 PM
JEFFREY D. KYLE
Clerk

**Brief of Amicus Curiae Paul E. Nunu Challenging the
Constitutionality of the Texas Vexatious Litigant Statutes**

From the 201st District Court of Travis County, Texas
Cause number D-1-GN-18-005130
The Honorable Catherine Mauzy, District Judge Presiding

Respectfully submitted,

/s/ Paul E. Nunu

Paul E. Nunu
SBN 15141850
3256 Burke Rd
Pasadena, Texas 77504
(713) 868-6868 Telephone
(713) 861-6868 Telecopier
NunuLawOffice@aol.com
Amicus Curiae

IDENTITY OF PARTIES AND COUNSEL

Appellant:

Madeleine Connor, Pro Se

P.O. Box 161962

Austin, Texas

78716-1962

512-289-2424

mgbconnor@yahoo.com

Appellee:

Douglas Hooks

Counsel for Appellee:

Sheryl Gray Rasmus

The Rasmus Firm

P. O. Box 1484

Manhaca, TX 78652-1484

(512) 481-0650

(512) 481-0604 (facsimile)

sgrasmus@rasmusfirm.com

Amicus Curiae (on behalf of Madeleine Connor):

Donald T. Cheatham

9801 Westheimer, Suite 300

Houston, Texas 77042

(713) 337-0155 Telephone

cheathamlaw@aol.com

Amicus Curiae (on behalf of Douglas Hooks):

Scott M. Tschirhart

State Bar No. 24013655

DENTON NAVARRO ROCHA BERNAL & ZECH, P.C.

A Professional Corporation

2500 W. William Cannon Drive, Suite 609

Austin, Texas 78745-5292

(512) 279-6431

(512) 279-6438 Facsimile

scott.tschirhart@rampage-aus.com

Texas Attorney General:

The Honorable Ken Paxton

const_claims@texasattorneygeneral.gov

Table of Contents

Identity of Parties and Counsel	-2-
Table of Contents	-3-
Index of Authorities	-3-
Amicus Statement of the Case	-4-
Introduction	-5-
Argument	-6-
Conclusion	-11-
Prayer	-11-
Certificate of Service	-11-
Certificate of Compliance with Rule 9.4, T.R.A.P.	-11-

INDEX OF AUTHORITIES

Supreme Court of the United States

<i>Bordenkircher v. Hayes</i> , 434 U.S. 357, 363 (1978)	-7-
<i>Borough of Duryea, Pennsylvania V. Guarnieri</i> , 564 U.S. 379, 388 (2011..)	-6-
<i>Brown v. Entertainment Merchants Association</i> , 564 U.S. 786, 792 (2011)	-10-
<i>Chambers v. Baltimore and Ohio Railroad Company</i> , 207 U.S. 142, 148 (1907)	-6-
<i>Chaffin v. Stynchcombe</i> , 412 U.S. 17 (1973) 32-33, n. 20:	-7-
<i>Shapiro v. Thompson</i> 394 U.S. 618, 631 (1969)	-7-
<i>United States v. Goodwin</i> 457 U.S. 368, 372 (1982)	-6-
<i>Wayte v. United States</i> , 470 U.S. 598, 608, (1985):	-7-

United States Court of Appeals for the Fifth Circuit

<i>Robinson v. Beto</i> 426 F.2d 797 (5th Cir. 1970).	-8-
<i>United States V. Dvorin</i> , 817 F.3d 438, 455 (5th Cir. 2016)	-7-
<i>United States V. Saltzman</i> 537 F.3d 353, 359 (5th Cir. 2008)	-8-
<i>United States V. Melancon</i> , 972 F.2d 566, 579 (5th Cir. 1992) ...	-8-
<i>United States V. Krezdorn</i> , 693 F.2d 1221, 1233 (5th Cir. 1982)	-8-

Texas Court of Criminal Appeals

<i>Lebo v. State of Texas</i> 90 S.W.3d 324,328 (Tex.Crim.App. 2002)	-9-
<i>Neal v. State</i> 150 S.W.3d 169, 173 (Tex.Crim.App. 2004)	-9-

Texas Court of Appeals

<i>Ex parte Legrand</i> 291 S.W.3d 31, 41 (Tex. App.-Houston [14 Dist.] 2009).	-9-
<i>Leonard v. Abbott</i> , 171 S.W.3d 451, 456-58 (Tex. App.—Austin 2005, pet. denied) ...	-10-

Texas Constitution

Texas Constitution Article I, §§ 13, 19, 27, and 29	-5-
---	-----

Amicus Curiae Statement of the Case

Amicus Curiae Paul E. Nunu identifies that the instant brief is tendered on behalf of Appellant, **Madeleine Connor**, as well as **all other Texas citizens**, because the State of Texas through enacting the Vexatious Litigant Statutes' and the Texas Courts' misapplication of these statutes have abridged every Texas citizens constitutional freedoms.

No one has paid *Amicus* any fee or anything of value nor would *Amicus* accept any such for preparing this brief.

Amicus certifies that he has e-served all parties including the Texas Attorney General with copies of this brief; and,

Amicus concurs with Appellant Connor's "Statement of the Case" as it relates to the facial unconstitutionality of Texas Civil Practices and Remedies Code Chapter 11.

Amicus fully concurs with *Amicus Curiae* Donald T. Cheatham and his brief facially challenging the Vexatious Litigant Statutes, but offers additional legal authority supporting the unconstitutionality of the Texas Vexatious Litigant statutes.

To the Honorable Texas Third Court of Appeals:

Comes now Amicus Curiae and submits the following additional authority supporting the declaration that the Texas Vexatious Litigant statutes are unconstitutional, as follows:

Introduction

This appeal invokes this Courts' review of the lower Court's failure to correctly apply the highest laws of our land, namely the United States Constitution's First Amendment guaranteed Freedom to Petition for Redress of Grievances, and the Texas Constitution Article I, §§ 13¹, 19², 27³, and 29⁴ guaranteed privileges and immunities.

These constitutional provisions are outcome determinative of this appeal.

In this case the Trial Court signed an order that declared Appellant a vexatious litigant and declared forfeit her guaranteed freedom to *pro se* Court access as a direct and proximate result of exercising her First Amendment freedom to petition.

As shown herein, this state action punishing Appellant for exercising her First Amendment guaranteed freedom is "patently unconstitutional".

1§ 13. EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW :Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. **All courts shall be open, and every person for an injury done him**, in his lands, goods, person or reputation, **shall have remedy by due course of law**.

2§ 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW :No citizen of this State shall be **deprived of** life, liberty, property, **privileges or immunities**, or in any manner disfranchised, **except by the due course of the law of the land**.

3§ 27. RIGHT OF ASSEMBLY; PETITION FOR REDRESS OF GRIEVANCES :The citizens shall have the **right**, in a peaceable manner, to assemble together for their common good; and **apply to those invested with the powers of government for redress of grievances** or other purposes, **by petition**, address or remonstrance.

4§ 29. PROVISIONS OF BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT; TO FOREVER REMAIN INVIOATE :To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and **all laws contrary thereto**, or to the following provisions, **shall be void**.

Argument

The U.S. Supreme Court has declared the First Amendment freedom to petition the government for redress of grievances through unfettered Court access to be a cognate right⁵, equal in dignity to the freedom of speech, and the right conservative of all other rights constitutionally protected.⁶

The United States Constitution's First Amendment guarantees five cognate freedoms to every citizen, i.e. religion, speech, press, assembly, and to petition the government for redress of grievances, through unfettered Court access.

These five (5) cognate freedoms are inseparable rights standing as the cornerstone of our democracy and the highest law of our land.

The Order declaring Appellant a vexatious litigant is “***patently unconstitutional***” because it is **state action punishing** Appellant's exercise of her guaranteed First Amendment freedom to petition for redress of grievances.

The U.S Supreme Court has repeatedly declared such state actions unconstitutional:

United States v. Goodwin⁷:

“To punish a person because he has done what the law plainly allows him to do is a due process violation “of the most basic sort.” . . . For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.”

⁵***Borough of Duryea, Pennsylvania V. Guarnieri***, 564 U.S. 379, 388 (2011) “This Court has said that the right to speak and the right to petition are cognate rights.”

⁶***Chambers v. Baltimore and Ohio Railroad Company*** 207 U.S. 142, 148 (1907).

⁷ ***United States v. Goodwin*** 457 U.S. 368, 372 (1982).

***Bordenkircher v. Hayes*⁸:**

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional.""

***Chaffin v. Stynchcombe*⁹:**

"FN20. . . . if the only objective of a state practice is to discourage the assertion of constitutional rights, it is "patently unconstitutional." *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969))."

***Shapiro v. Thompson*¹⁰:**

"If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional. *United States v. Jackson*, 390 U.S. 570, 581 (1968)."

***Wayte v. United States*¹¹:**

"In particular, the decision to prosecute (i.e. state action) may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," *Bordenkircher v. Hayes*, *supra*, at 364, quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962), including the exercise of protected statutory and constitutional rights, see *United States v. Goodwin*, *supra*, at 372."

The Fifth Circuit has repeatedly followed:

***United States V. Dvorin*¹²:**

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372, (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363, (1978)). Accordingly, a prosecutor may not increase the charge or penalty against a defendant solely as a punishment for invoking his right to appeal. *Saltzman*, 537 F.3d at 359 (citing *United States v. Krezdorn*, 718 F.2d 1360, 1362-65 (5th Cir. 1983) (en banc)).

⁸ *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

⁹ *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) 32-33, n. 20:

¹⁰ *Shapiro v. Thompson* 394 U.S. 618, 631 (1969).

¹¹ *Wayte v. United States*, 470 U.S. 598, 608, (1985).

¹² *United States V. Dvorin*, 817 F.3d 438, 455 (5th Cir. 2016).

***United States V. Saltzman*¹³:**

“To punish a person because he has done what the law plainly allows him to do is a due process violation ‘of the most basic sort.’ ” *United States v. Goodwin*, 457 U.S. 368, 372, (1982) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363, (1978)). Thus, a prosecutor may not increase the charge against a defendant solely as a penalty for invoking a right, such as pursuing an appeal. See, e.g., *United States v. Krezdorn*, 718 F.2d 1360, 1362-65 (5th Cir.1983) (en banc).

***United States V. Melancon*¹⁴:**

“In light of the Sierra Waiver's systemic demerits, it is presumptively constitutionally improper for a prosecutor to add to his or her interests at the bargaining table the conditioning of plea agreements upon the defendant's abdicating the right to appeal (on any grounds) a forthcoming sentence. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363, (1978) (“[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' ”) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n. 20, (1973)).”

***United States V. Krezdorn*¹⁵:**

“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' *Bordenkircher v. Hayes*, 434 U.S. 357, 363, (1978)”

***Robinson v. Beto*¹⁶:**

Due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts. *North Carolina v. Pearce*, 1969, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. A defendant's right of appeal must be free and unfettered. *Id.*

¹³ ***United States V. Saltzman*** 537 F.3d 353, 359 (5th Cir. 2008).

¹⁴ ***United States V. Melancon***, 972 F.2d 566, 579 (5th Cir. 1992).

¹⁵ ***United States V. Krezdorn***, 693 F.2d 1221, 1233 (5th Cir. 1982).

¹⁶ ***Robinson v. Beto*** 426 F.2d 797 (5th Cir. 1970).

The Texas Court of Criminal Appeals has followed:

***Lebo v. State of Texas*¹⁷:**

"A person does not have a constitutional right to appeal a criminal conviction, but if state law does provide for appeal, then "a defendant's right of appeal must remain unfettered." [16] FN[16] *Ex parte Canada*, 754 S.W.2d 660, 667 (Tex.Crim.App.1988). In *Canada*, this Court discussed *Robinson v. Beto*, 426 F.2d 797 (5th Cir.1970), in which the Fifth Circuit stated that **a state may not impose any penalty on a person for exercising a right of appeal and held that "due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts."** 426 F.2d at 798. . . . **As the Supreme Court has stated: "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' "** *United States v. Goodwin*, 457 U.S. 368, 372, (1982)".

The Texas 14th Court of Appeals has followed:

***Ex parte Legrand*¹⁸:**

"Generally, prosecutors have broad discretion to decide what charges to file against a criminal defendant. *Neal v. State*, 150 S.W.3d 169, 173 (Tex.Crim.App.2004). That discretion is not without limits, however. For example, **a prosecutor may not increase the charges against a defendant simply as a punishment for invoking a right, such as pursuing an appeal**. *United States v. Saltzman*, 537 F.3d 353, 359 (5th Cir.2008). **"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'"** *United States v. Goodwin*, 457 U.S. 368, 372 (1982)."

To date all Texas Courts have unconstitutionally applied the Vexatious Litigant Statutes to deny Appellant and many others similarly situated their guaranteed freedom to petition for redress of grievances.

The right of unfettered Court access is the promise for the Rule of Law, without which promise there is no Rule of Law.

¹⁷ ***Lebo v. State of Texas*** 90 S.W.3d 324,328 (Tex.Crim.App. 2002). Followed in ***Neal v. State*** 150 S.W.3d 169, 173 (Tex.Crim.App. 2004)

¹⁸ ***Ex parte Legrand*** 291 S.W.3d 31, 41 (Tex. App.-Houston [14 Dist.] 2009).

This Court in ***Leonard v. Abbott*** as well as other Texas Appellate Courts have repeatedly used an erroneous constitutional analysis of these statutes i.e. a “***weighing***” or “***balancing***” test in order to conclude they meet Texas Constitutional muster.

The U.S. Supreme Court has emphatically rejected this "startling and dangerous" proposition in ***Brown v. Entertainment Merchants Association***¹⁹ declaring the First Amendment and the freedoms it guarantees are not subject to a weighing or balancing analysis:

“The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a “**simple balancing test**” that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. *Stevens*, 559 U.S. at 470, We emphatically rejected that “startling and dangerous” proposition. *Ibid.* “ Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.” *Id.*, at 472, But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, **a legislature may not revise the “judgment [of] the American people,” embodied in the First Amendment, “that the benefits of its restrictions on the Government outweigh the costs.”** *Id.*, at 470.

These failures deprive all Texas citizens equal protection of core First and Fourteenth Amendment guaranteed privileges and immunities.

Under express constitutional mandates contained in the First and Fourteenth Amendments, the statutes must be declared void because they place onerous restrictions on unfettered constitutional freedoms.

Clearly the statutes are unconstitutional under the guaranteed protections of the Texas Constitution Article I, §§ 13, 19, 27, and 29, and this Court should so declare.

¹⁹***Brown v. Entertainment Merchants Association***, 564 U.S. 786, 792 (2011).

CONCLUSION

The statutes are repugnant to core constitutional freedoms and must be invalidated.

This Honorable Court has sworn to *preserve, protect and defend* these constitutional freedoms and must remedy this constitutional injustice without delay.

PRAYER

WHEREFORE PREMISES CONSIDERED, Amicus Curiae prays that this Court render judgment declaring the vexatious litigant statutes unconstitutional, and for such other relief to which Appellant might be entitled at law or in equity, as this Court deems just and proper.

Respectfully submitted,

/s/ Paul E. Nunu

Paul E. Nunu
SBN 15141850
3256 Burke Rd
Pasadena, Texas 77504
(713) 868-6868 Telephone
(713) 861-6868 Telecopier
NunuLawOffice@aol.com
Amicus Curiae

Certificate of Compliance with T.R.A.P .9.4,

Pursuant to Texas Rule of Appellate Procedure 9.4, this is to certify that this document complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4 because the Amicus Curiae Brief is computer-generated and does not exceed Appellants' allotted 27000 words. Using the word-count feature of Word, the undersigned certifies that this document contains 2074 words from the salutation to the signature block. This document also complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Word in 14-point Arial Narrow footnotes 12 point Arial Narrow.

/s/ Paul E. Nunu

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument has been e-filed and e-served upon the following on May 4, 2020, at the following address:

Appellant:

Madeleine Connor, Pro Se
P.O. Box 161962
Austin, Texas
78716-1962
512-289-2424
mgbconnor@yahoo.com

Appellee:

Douglas Hooks

Counsel for Appellee:

Sheryl Gray Rasmus
The Rasmus Firm
P. O. Box 1484
Manchaca, TX 78652-1484
(512) 481-0650
(512) 481-0604 (facsimile)
sgrasmus@rasmusfirm.com

Amicus Curiae (on behalf of Madeleine Connor):

Donald T. Cheatham
9801 Westheimer, Suite 300
Houston, Texas 77042
(713) 337-0155 Telephone
cheathamlaw@aol.com

Amicus Curiae (on behalf of Douglas Hooks):

Scott M. Tschirhart

State Bar No. 24013655
DENTON NAVARRO ROCHA BERNAL & ZECH, P.C.
A Professional Corporation
2500 W. William Cannon Drive, Suite 609
Austin, Texas 78745-5292
(512) 279-6431
(512) 279-6438 Facsimile
scott.tschirhart@rampage-aus.com

Texas Attorney General:

The Honorable Ken Paxton

const_claims@texasattorneygeneral.gov

/s/ Paul E. Nunu

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Paul Nunu on behalf of Paul Nunu
Bar No. 15141850
nunulawoffice@aol.com
Envelope ID: 42729730
Status as of 05/04/2020 15:46:59 PM -05:00

Associated Case Party: Madeleine Connor

Name	BarNumber	Email	TimestampSubmitted	Status
Madeleine Connor		mgbconnor@yahoo.com	5/4/2020 3:38:02 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Hope Avila		hope.avila@rampage-aus.com	5/4/2020 3:38:02 PM	SENT
Scott MTschirhart		scott.tschirhart@rampage-aus.com	5/4/2020 3:38:02 PM	SENT
Sherry Rasmus		sgrasmus@rasmusfirm.com	5/4/2020 3:38:02 PM	SENT
Madeleine Connor		mgbconnor@yahoo.com	5/4/2020 3:38:02 PM	SENT
Bob Nunis		bnunis@nunislaw.com	5/4/2020 3:38:02 PM	SENT
Stephanie Criscione		scriscione@nunislaw.com	5/4/2020 3:38:02 PM	SENT
Donald TCheatham		cheathamlaw@aol.com	5/4/2020 3:38:02 PM	SENT